(3)

Supreme Court, U.S.
FILED
APR 16 1996

No. 95-1414

In the Supreme Court of the United States

OCTOBER TERM, 1995

APACHE CORPORATION, *Petitioner*

v.

LEO MOORE, DAISY MOORE, AND BESS COLE,
Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of Texas

---

REPLY BRIEF FOR THE PETITIONER

JESS H. HALL, JR.
JAMES E. ESSIG
JEFF WEEMS
Liddell, Sapp, Zivley, Hill & LaBoon, L.L.P.
3300 Texas Commerce Tower
Houston, TX 77002
(713) 226-1200

ANDREW L. FREY*
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for Petitioner
* *Counsel of Record*

13 pp

TABLE OF CONTENTS

	Page
REPLY STATEMENT OF FACTS	1
ARGUMENT	5
CONCLUSION	10

TABLE OF AUTHORITIES

Case **Page**

BMW of North America, Inc. v. *Gore*, No. 94-896 . . . . . 1, 5, 7, 8, 10

Pacific Mut. Life Ins. Co. v. *Haslip*, 499 U.S. 1 (1991) 6

REPLY BRIEF FOR THE PETITIONER

Respondents implicitly concede that this case involves no deliberate misconduct (Opp. 23-24); they admit that the conduct was an "isolated" occurrence (Opp. 17); and they, by and large, do not contest that the allegedly negligent conduct in this case was that of low-level employees rather than top or even mid-level Apache management.[1] Indeed, their own statement of facts confirms that, far from being an egregious wrongdoer, Apache, if anything, was the victim of the negligence of its low-level employees. See Opp. 10-13 (discussing failure of low-level employees to monitor the relief valve and to ensure that the valve was connected to its power source). In view of these explicit and implicit concessions, it is simply preposterous for respondents to suggest (Opp. 18) that "the evidence against Apache is overwhelmingly more egregious than the evidence against BMW" and that there therefore is no point to holding this case during the pendency of the *BMW* case.

REPLY STATEMENT OF FACTS

Even accepting every word of respondents' statement of facts as true, that presentation does nothing to undermine our central point that Apache's conduct in this case was nowhere near so heinous as to justify the punishment meted out by the jury. Nevertheless, a few points of clarification are in order.

1. *Clower's alcoholism.* Respondents emphasize (Opp. 7) that a drilling foreman for the Key 1-11 well, Gordon Clower, was an alcoholic. Although a few employees in the Elk City field office may have known of Clower's insobriety, however, there is no evidence that anyone in management had such knowledge. Moreover, when, as a consequence of the "kick," Clower's supervisor learned that Clower had failed in his duties

---

[1] The only allegedly negligent act that respondents attribute to anyone other than a low-level employee is the decision by Loyd Somers, an engineering supervisor in Apache's Tulsa office, to install a relief valve rather than immediately pull and rework the tubing after the employees in the field discovered the pressure on the backside. See Opp. 8-9. As we discuss below (at pages 2-3), Somers' judgment call was manifestly reasonable and certainly not the kind of conduct warranting a seven-digit punishment.

by being absent from the well site, Clower was fired immediately. Tr. 2727. That prompt and decisive action is hardly indicative of indifference to the proper management of the well.

2. *The "kick" and its aftermath.* Respondents insinuate (Opp. 7) that fault for the "kick" should be laid at Apache's door. It is undisputed, however, that the kick was the result of a cardinal error (the failure to pump sufficient amounts of drilling mud into the hole) committed by *Ratliff*, which had been hired specifically for its expertise in the drilling of wells. Tr. 2206, 2725-2728.

The categorical assertion (Opp. 8) that, in drilling out the cement, Apache's contractor "cut into the casing and weakened its walls" is misleading.[2] There was no proof whatever — only the speculation of respondents' paid experts — that the contractor cut into the casing, much less that the casing was weakened as a result. Even assuming that there were something more than speculation to support respondents' hypothesis, there is no evidence to support the further inference that the drilling of the cement had a causal connection to the blowout. Indeed, the evidence strongly suggests the absence of such a connection. It is undisputed that the cement backed up no higher than 7,700 feet from the surface. Tr. 1490. Respondents' expert opined that the casing ruptured 1,000 to 2,500 feet below the surface (Tr. 1586, 1678-1679) — nowhere near the area in which the drilling of the cement took place.

3. *Somers' decision not to pull the tubing immediately after discovery of the pressure on the backside.* Respondents provide an incomplete and misleading description of Loyd Somers' decision not to pull the tubing and rework the well after Apache's field employees discovered the pressure on the backside. See Opp. 8-9. Somers did not simply ignore the need to address the leak in favor of the less expensive alternative of installing a relief valve. Rather, it was his conclusion — based

---

[2] Although respondents gloss over the fact, here again Apache acted responsibly by hiring an outside contractor that specialized in just this problem to drill out the cement from the casing. Tr. 708-709, 2728.

on his experience with other wells — that there would be "less problems" if Apache could first "put [the well] on the pipeline and flow it and get the pressure down on the well before we went into the well and tried to make repairs." Tr. 2302. Because Somers expected that connection with the pipeline would be imminent (Tr. 2305), he elected to employ a relief valve to stabilize the pressure. Nevertheless, it is undisputed that Somers would have ordered that the tubing be pulled and further corrective action be taken if the pressure did not subside. Tr. 1583, 2873. In fact, however, the pressure stabilized at around 6,000 pounds per square inch. Tr. 2310-2312.

Somers' measured response to the discovery of the pressure on the backside hardly constitutes the kind of conscious indifference that would justify levying a multimillion dollar punishment against his employer. To the contrary, as we pointed out in the petition (at 13-14), Apache's expert testified that Somers' decision not to pull the tubing immediately "was a decision that *every* operator that I've worked with in the Anadarko Basin would have made under the same or similar circumstances." Tr. 2735 (emphasis added).

4. *The kickback scandal.* In an effort to bolster the implication that the kickback scandal had a direct and substantial causal relationship to the blowout, respondents quote an internal memorandum that states that "[c]ompanies making illegal payments would not inspect equipment as often" and that an Apache foreman or supervisor who had received kickbacks "would not be in a position to complain if a tool failed." Opp. 14-15 (quoting P. Exh. 50). Respondents neglect to inform the Court that those statements were "generalizations about * * * the situation as a whole" and in no way purported to constitute "specific conclusions about particular items," let alone findings regarding the effect of kickbacks on the drilling of the Key 1-11 well. See P. Exh. 50.

Respondents' assertion (Opp. 15) that White Stripe failed to inspect the intermediate casing is simply wrong. White Stripe's president (Danny Merz), the White Stripe employee responsible for the Key 1-11 job (Lupe Jalomo), and Apache's drilling

supervisor (Ralph Walker) all testified that White Stripe did a full API inspection on the 7⅝ inch intermediate casing. Tr. 128-129, 2214, 3269-3270, 3280-3281. Merz, Jalomo, and White Stripe salesman Darrel McDonel further testified that White Stripe wanted to perform a similar inspection on the production tubing but that Walker authorized and White Stripe performed only the less expensive clean, visual and drift inspection. Tr. 129, 381, 3272-3273.[3] McDonel did testify that Merz said that "'we hadn't inspected the pipe; we're going to get blamed for [the blowout]; it's going to haunt us,' and then went immediately to the clean visual and drift end of it." Tr. 382 (internal quotation marks added). It is obvious from the reference to "the clean visual and drift end of it" that McDonel understood Merz to be saying that he expected White Stripe to be blamed because it had not performed the full API inspection on the tubing, not that White Stripe had performed no inspection at all.

Respondents intimate take Apache dragged its feet in response to the kickback scandal, asserting (Opp. 16-17) that Apache did not begin investigating the scandal until after it had been sued and that Apache was still considering appropriate safeguards "over a year and a half after the blowout." There is no evidence, however, that Apache management knew of kickbacks but decided to delay investigation. Nor is there evidence that Apache decided to conduct an internal investigation because it believed that such an investigation would benefit it in the litigation arising out of the blowout. To the contrary, the record unequivocally reflects that Apache made a conscious decision to pursue the investigation despite its belief that, by exposing the

---

[3] The API inspection involves running each length of pipe through a machine that electronically inspects the pipe for cracks and other defects. Tr. 127-128; 3271. This kind of inspection was not common at that time, but has become so subsequently. Tr. 3276. A clean, visual and drift inspection involves cleaning the threads with a solvent, visually inspecting the threads to ensure that they have not been damaged during transit, and placing a cylinder through the inside of the pipe to ensure that the internal diameter is uniform so that the drilling crew will not drill into the casing at any point. Tr. 126-127, 3267-3269.

misdeeds of its employees and contractors, it would be creating a cadre of witnesses with a motivation to skew their testimony against it. P. Exh. 54, at KB200013815; Tr. 1254. Finally, the suggestion that Apache delayed unreasonably in implementing additional safeguards against future kickback scandals is supported by neither the record nor common sense. The exhibits cited by respondents reflect that Apache's in-house attorneys believed that the development of specific safeguards could not occur until they had completed their internal investigation and gotten a full understanding of the "recurring problems and exposures identified in these investigations." See P. Exh. 52, at KB200013819. There is nothing nefarious about that reasoning.[4]

ARGUMENT

To our knowledge, this Court has held every recent petition presenting a preserved claim of excessive punitive damages pending its consideration and disposition of *BMW*. Nothing said in the brief in opposition warrants a different outcome here.

1. Respondents contend (Opp. 17-18) that Texas's enactment of tort reform legislation makes this case unworthy of review. That argument is doubly misguided. First, because the statute applies only to causes of action accruing after September 1, 1995, there remain literally thousands of claims in the Texas courts that are not governed by the statute. Second, and more fundamentally, the question of excessive punitive damages will continue to arise whether or not a particular state attempts to put limits on such damages. Because the factors relevant to reviewing the amount of punitive damages under the Due Process

---

[4] As a review of the exhibits will reveal, Apache conducted a model investigation. The in-house attorneys were thorough and diligent, yet at all times took pains to ensure that the innocent were not tarred by the misdeeds of their co-workers. P. Exhs. 52-54, 56-60. Although they believed that the adoption of specific safeguards should await the completion of the investigation, they nonetheless made several broad suggestions to serve as the framework for more detailed proposals. See P. Exh. 52, at KB200013819.

Clause will not vary from state to state, there is no reason to refuse to review a Texas case merely because, if all goes as planned, there should be fewer excessive punitive exactions in Texas in the future.

2. Respondents offer a smorgasbord of unpersuasive reasons why the Court should ignore the startling 138:1 ratio of punitive to compensatory damages. See Opp. 19-22. They first contend that the true ratio is much smaller because we have failed to factor in the damages awarded to the five other plaintiffs. Because those plaintiffs settled their claims for an amount that is not in the record, there is no basis for including in the analysis of respondents' judgment the compensatory and punitive damages awarded to the settling plaintiffs (but neither received by them nor even approved by any reviewing court). Even if the awards to the other five plaintiffs are included in the analysis, however, the ratio would be over 55:1.[5] In the absence of evidence that additional harm not encompassed within the damages award was *likely*, ratios of that magnitude give rise to serious constitutional concern. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 23 (1991) (declaring a 4:1 ratio to be "close to the line").

---

[5] Respondents are simply wrong in suggesting (Opp. 19-20) that it would be appropriate to compare the punitive damages to the conversion damages found by the jury. After briefing regarding the appropriateness of any conversion award under the facts of this case, the trial court declined to enter judgment on the conversion award. See Pet. App. 43a (entering judgment only on the gross negligence awards and the punitive damages award). In essence, the court granted Apache's motion for judgment notwithstanding the verdict with respect to the conversion claim. Because respondents had no cognizable claim for conversion damages, it is inappropriate to consider the jury's conversion awards for purposes of evaluating whether the punitive damages are disproportionate.

In any event, the jury expressly found that the conversion was not willful or knowing. Pet. App. 40a. Because the conversion did not involve conduct that could give rise to punitive damages, it is not logical to use the conversion damages as a measure of the appropriate amount of punitive damages.

Respondents' assertion (Opp. 20) that this case does involve *likely* potential, but unrealized, harm — namely, the possibility of physical injury to Apache employee Tom Reames — is unsupported by any citation to the record. There was no evidence whatever that Reames would *likely* have been injured had he monitored the well on a daily basis as he should have done. Nor may such a fact be assumed. Whatever gaps there may have been in Reames' training regarding Axelson relief valves, there is no basis for assuming that he would not have noticed the warning signs of an imminent blowout and quickly removed himself from harm's way. To the contrary, it is undisputed that when Reames did go to the well, he did read the casing pressure gauge, which regularly reflected a pressure of around 6,200 pounds per square inch. Tr. 3220-3222. Had he gone to the well and read the gauge in the days preceding the blowout, he surely would have observed an increase in pressure that would have caused him to take precautions to protect himself. Moreover, the record reflects that, when the well blew out, the wellhead shot straight up into the air. Tr. 2373. Reames would have had to be practically sitting on the wellhead in order to have been injured.

Respondents also urge the Court to factor into the analysis the damage caused to other mineral interest and royalty owners who settled with Apache prior to trial. Opp. 21-22. As with the five plaintiffs who settled after the trial, the amounts of the settlements are not in the record and it is, for that reason alone, improper to rely upon the damage caused to those individuals. For all anyone knows, if the jury had been told how much Apache had paid in settlement, it might have concluded that the deterrent function had already been adequately served and that little or no punitive damages needed to be added.

In sum, respondents have not so thoroughly refuted our showing of disproportionality (or indeed come anywhere close to doing so) as to make it pointless even to hold the petition until *BMW* is decided. To the contrary, their arguments underscore the need for further guidance on this important factor in the excessiveness analysis.

3. Respondents' discussion of the reprehensibility factor also fails to justify their request that the petition be denied without awaiting the resolution of *BMW*. To begin with, respondents concede that the conduct here involved gross negligence but contend that, as defined by the Texas Supreme Court, gross negligence is not on the low end of the reprehensibility spectrum. Opp. 23-24. In assessing the nature of the conduct here, however, Texas's definition of gross negligence is irrelevant. What matters is whether, taking the evidence in the light most favorable to the verdict, the conduct is closer to ordinary negligence, hence warranting a comparatively modest penalty, or instead is closer to a deliberate and malicious wrongdoing, which would warrant a more severe punishment. Here, although concluding that the jury's finding of gross negligence was sustainable, the Court of Appeals identified *no* evidence (and respondents cite none in their opposition) that, in the course of drilling the Key 1-11 well, Apache consciously decided to ignore an extreme degree of risk. Nor, given the fact that Apache expected this well to be its best producer *ever* (Tr. 1409, 1587, 2876), would it be reasonable to infer that Apache made a conscious — and patently irrational — decision to disregard a high risk that there would be an immensely harmful (to Apache) blowout. Because there is no evidence and no basis for inferring that Apache deliberately ignored an extreme risk, the conclusion is inescapable that the conduct here was among the least reprehensible for which punishment can be levied (no matter what the Texas courts concluded on the liability point).

Respondents assert (Opp. 25) that the drilling of the Key 1-11 well was "completely at odds with industry custom." It is true, to be sure, that certain conduct identified by respondents — particularly the kickbacks and the alleged failure to monitor the relief valve properly (neither of which were authorized or endorsed by Apache management) — did not comport with industry standards. But because we are not here challenging the imposition of punitive liability, but rather only the amount, the question of compliance with industry custom is not an all-or-nothing proposition. As respondents steadfastly ignore, it is undisputed that, in many important ways, Apache's conduct in

overseeing the drilling of the well comported with or exceeded industry custom. See Pet. 13-14. That fact is highly relevant in determining whether a punishment of the magnitude involved here exceeded the bounds of reasonableness.

Respondents similarly misunderstand our point regarding the good-faith dispute among experts. Contrary to respondents' assumption (Opp. 28), we do not here contend that such a dispute should cut off punitive damages entirely (although there is much merit to that contention). Rather, our point simply is that the existence of a genuine dispute as to whether a defendant's conduct was even negligent weighs against finding that the conduct was so reprehensible as to warrant a multimillion dollar punishment. As to that argument, respondents have nothing to say.

4. We argued in the petition (at 16) that the fact that Apache itself lost tens of millions of dollars as a result of the blowout weighs heavily against the conclusion that a multimillion dollar punishment is reasonably necessary to deter Apache and other operators from cutting corners in the drilling of wells.[6] Respondents argue (Opp. 29) that we have overstated the loss to Apache because it recovered substantial amounts in settlements from other defendants. But that argument only highlights the fact that Apache, like respondents, was a victim here not just of the negligence of its low-level employees but also of that of some of its vendors. Large punitive exactions hardly are necessary to "deter" businesses from being victimized by the negligence of their employees and vendors.

---

[6] In stating that "[t]he severity of financial loss suffered as the result of one's own gross negligence has never been a defense to punitive damages" (Opp. 29), respondents once again misperceive our point. Our contention is not that liability for punitive damages is constitutionally impermissible, but rather that the amount imposed here is excessive.

CONCLUSION

Nothing respondents have said in their opposition warrants the extraordinary step of denying the petition without awaiting the outcome of *BMW*. Indeed, the opposition serves only to confirm that, if the Court does not reach the excessiveness issue in *BMW*, this case — involving as it does a high ratio of punitive to actual damages and an isolated instance of non-intentional wrongdoing of which the principal victim was the defendant itself — would be a particularly good one in which to address that recurring and important question. The petition for certiorari should be granted.

Respectfully submitted.

JESS H. HALL, JR.
JAMES E. ESSIG
JEFF WEEMS
Liddell, Sapp, Zivley, Hill & LaBoon, L.L.P.
3300 Texas Commerce Tower
Houston, TX 77002
(713) 226-1200

ANDREW L. FREY*
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for Petitioner
* *Counsel of Record*

APRIL 1996